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No. 90-525

Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RON TAYLOR, COMMISSIONER OF
THE INSURANCE DEPARTMENT FOR THE
STATE OF ARKANSAS ..... *Petitioner*

AND

ARKANSAS CREDIT INSURANCE
ASSOCIATION (INTERVENOR BELOW) ..... *Petitioner*

VS.

FIRST NATIONAL BANK OF EASTERN
ARKANSAS, A NATIONAL BANKING
ASSOCIATION .....*Respondent*

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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## RESPONDENT'S BRIEF IN OPPOSITION

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ARKANSAS LEGISLATIVE DIGEST, INC.

## QUESTION PRESENTED FOR REVIEW

*WHETHER DEBT CANCELLATION AGREEMENTS AS AUTHORIZED BY THE COMPTROLLER OF THE CURRENCY ARE WITHIN THE INCIDENTAL POWERS OF 12 U.S.C. §24 (SEVENTH) AND GOVERNED BY THE NATIONAL BANK ACT AND THE RULES AND REGULATIONS THEREOF, OR ARE DEBT CANCELLATION AGREEMENTS THE BUSINESS OF INSURANCE AND, IF DETERMINED TO BE THE LATTER, WHETHER THE NATIONAL BANK ACT SUPERCEDES AND PREEMPTS REGULATION BY THE ARKANSAS INSURANCE DEPARTMENT AND THE RULES THEREOF.*

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## RESPONDENT'S BRIEF IN OPPOSITION

---

## STATEMENT OF THE CASE

This case involves the issue of whether a national bank, such as First National Bank of Eastern Arkansas (the Bank), can enter into debt cancellation agreements with its borrowers. National banks are regulated by the National Bank Act, 12 U.S.C. §1, et seq., and the Comptroller of the Currency is the official charged with the administration of the National Bank Act. 12 U.S.C. §93(a). In 1964, the Comptroller of the Currency issued a regulation designated 12 C.F.R. §7.7495 which authorized national banks to enter into debt can-

cellation agreements with its borrowers. The Bank began entering into debt cancellation agreements with some of its customers in 1987. The Bank initially charged the same fee as credit life insurance companies, with the intent to adjust the fee according to its experience. The Bank later reduced the fee by approximately 10%. A few weeks after it began issuing debt cancellation agreements, the bank was advised by the Arkansas Department of Insurance to cease issuing debt cancellation agreements. The bank filed this action seeking to determine whether its actions in regard to debt cancellation agreements are considered to be the business of banking, thereby governed by the National Bank Act and the rules and regulations thereof, or the business of insurance and, if determined to be the latter, whether the National Bank Act supercedes and preempts regulation by the Arkansas Insurance Department under the insurance laws of the State of Arkansas and the rules and regulations issued pursuant thereto. The District Court found that the Bank's debt cancellation agreements are within the incidental powers necessary to carry on the business of banking and do not constitute the business of insurance. The Eighth Circuit Court of Appeals found that the Comptroller's authorization of debt cancellation agreements was reasonable and within the incidental powers granted by the National Bank Act and that debt cancellation agreements do not constitute the "business of insurance" under the McCarren-Ferguson Act.

## SUMMARY OF ARGUMENT

A Writ of Certiorari is not a matter of right and will only be issued for special and important reasons. There are no special or important reasons for this Honorable Court to issue a Writ of Certiorari in this case. The question presented is one of first impression and does not conflict with any decision of this Court, any United States court of appeal, or any state court of last resort. The Eighth Circuit did not commit any errors in its analysis of this matter and followed the applicable decisions of this Honorable Court.

The Eighth Circuit did not commit an error in its analysis of whether a debt cancellation agreement was an "incidental power" as defined by the National Bank Act by failing to adequately scrutinize the issue. A careful and proper analysis was undertaken and all the relevant cases were properly considered by the Eighth Circuit. Further, there was no improper deference to the Comptroller's opinion.

The question presented is a narrow one confined only to a determination of whether debt cancellation agreements are within the "incidental powers" granted by the National Bank Act and whether such agreements constitute the "business of insurance" so as to invoke the McCarren-Ferguson Act. The Eighth Circuit's decision will not open any floodgates to unregulated and uninhibited insurance underwriting activities by national banks as alleged by the Petitioners.

The Eighth Circuit panel's decision does not grant the Comptroller of the Currency any power over the McCarren-Ferguson Act and the Eighth Circuit did not find that because the activity was "incidental" to the business of banking that it cannot be within the ambit of the McCarren-Ferguson Act.

These were separate and distinct issues that were addressed by the Eighth Circuit panel separately. The Eighth Circuit panel first found that debt cancellation agreements were within the "incidental powers" granted by the National Bank Act. The Court then analyzed the issue of whether these agreements constituted the "business of insurance". The Eighth Circuit found debt cancellation agreements do not constitute the "business of insurance" under the McCarren-Ferguson Act. As to both issues, the Eighth Circuit underwent a proper legal analysis.

The panel's decision that debt cancellation agreements do not constitute the "business of insurance" did not cast any doubt on the continued viability of the McCarren-Ferguson Act and it does not give the Comptroller any additional powers.

No errors were committed by the Eighth Circuit in analyzing the issues in this case. Further, the decision does not conflict with any other decision of this Honorable Court. There is no important or special reason for this Honorable Court to issue a Writ of Certiorari in this case. Therefore, the Petitioners' request for a Writ of Certiorari should be denied.

## ARGUMENT

### I.

### *CONSIDERATIONS IN GRANTING A WRIT OF CERTIORARI*

The Petitioners are asking this Court to grant a Writ of Certiorari in this case because they feel that the decision of the Eighth Circuit panel has "rewritten the McCarren-Ferguson Act and expanded the National Bank Act powers of the Comptroller and of national banks". They further claim that this was accomplished by way of a legal analysis which conflicts with prior decisions of this Honorable Court. This simply is not the case.

This case presents an issue that has never been addressed by this Court, a United States court of appeals, or a state court of last resort. It is a question of first impression and the Eighth Circuit analyzed and followed the relevant cases decided by this Court in determining that debt cancellation contracts are an "incidental power" necessary to carry on the "business of banking" as defined by the National Bank Act and that such agreements do not constitute the "business of insurance" as that term is defined in the McCarren-Ferguson Act. There is no conflict between the Eighth Circuit's decision in this case and prior decisions of this Honorable Court.

The Eighth Circuit's decision did not rewrite the McCarren-Ferguson Act nor did it expand the National Bank Act. The decision is a narrow one in which the Court simply determined that the Comptroller's authorization of debt cancellation contracts is reasonable and within the "incidental powers" granted by the National Bank Act and that debt cancellation agreements do not constitute the "business of

insurance" as defined by the McCarren-Ferguson Act. The Eighth Circuit simply followed the applicable decisions and interpreted the language of two (2) Federal statutes. This has been done numerous times by the United States courts of appeal and is one of the reasons we have United States courts of appeal.

A Writ of Certiorari is not a matter of right, but of judicial discretion. It will only be granted for special and important reasons. U. S. Supreme Court, Rule 10. Some reasons considered are:

> (1) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.
>
> (2) When a state court of last resort has decided a federal question in a way that conflicts with the decisions of another state court of last resort or of a United States court of appeals.
>
> (3) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Supreme Court Rule 10.

As stated earlier, this case presents a question of first

impression of this Honorable Court, as well as for the Eighth Circuit Court of Appeals. For that matter, no other United States court of appeals or a state court of last resort has addressed the question presented by this case.

Turning to the first consideration, the Eighth Circuit's decision in this case did not conflict with the decision of another United States court of appeals on the same matter nor did the Eighth Circuit's decision decide a federal question in a way so as to conflict with a state court of last resort. Further, there is nothing in the record that indicates that the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Clearly, the first consideration is not applicable.

The second consideration has no application because this is a request for a Writ of Certiorari from a decision of a United States court of appeals and not from a state court of last resort.

As to the third consideration, the question presented in this case is not one that should be settled by this Honorable Court. The Eighth Circuit was simply called upon to interpret the language of two (2) federal statutes. The Eighth Circuit analyzed and followed the applicable decisions of this Honorable Court, as well as analyzing the decisions in other United States courts of appeal. The Eighth Circuit's decision in this case does not in any way conflict with the applicable decisions of this Honorable Court. In fact, the Eighth Circuit cited several decisions of this Honorable Court as support for its decision.

For the foregoing reasons, the Petitioners' request for a Writ of Certiorari from this Honorable Court should be denied.

II.

## *NO ERROR REGARDING THE "INCIDENTAL POWERS" QUESTION*

The Eighth Circuit panel, as well as the trial court in the first instance, did not ignore or fail to adequately scrutinize the issue of whether a national bank's issuance of debt cancellation agreements meet the test of "incidental powers" as defined by the National Bank Act. The panel analyzed the issue by addressing the question of whether the activity is closely related to an express power and is useful in carrying out the business of banking. This is similar to the test that is set out in *Arnold Tours, Inc. vs. Camp*, 472 F.2d 427 (1st Cir. 1972), which is the test that most courts have adopted in making the determination of whether a national bank's activity is authorized as an incidental power necessary to carry on the business of banking. The panel then cited five (5) cases, along with their holdings, as support for its decision that debt cancellation agreements are incidental to an express power of national banks. *Colorado National Bank vs. Bedford*, 310 U.S. 41 (1939); *Securities Indus. Assn. vs. Clarke*, 885 F.2d 1034 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 1113 (1990); *American Ins. Assn. vs. Clarke*, 865 F.2d 278 (D.C. Cir. 1988); *M & M Leasing vs. Seattle First National Bank*, 563 F.2d 1377 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Arnold Tours, Inc. vs. Camp*, 472 F.2d 427 (1st Cir. 1972). See Appendix, Page 5. Based upon these cases, the panel found that the debt cancellation agreements in issue in this case are directly related to First National Bank of Eastern Arkansas' expressly authorized lending power; are a convenient method of extinguishing debt in case of death; and enable First National Bank of Eastern Arkansas to avoid the time, expense and risk associated with attempting to collect the balance of the loan

from the borrower's estate. See Appendix, Page 6.

There really is no need for any further analysis. It has already been determined that banks can act as an agent selling credit life insurance in connection with its loans as an incidental power. Debt cancellation agreements were being offered by the bank to its customers in connection with a loan as well. The service to the customer is the same — i.e., the estate is not responsible for the debt. Therefore, the debt cancellation agreement is a service being offered that is "incidental" to the lending of money. There was no error committed by the Eighth Circuit panel's analysis that debt cancellation agreements are within the "incidental powers" of the National Bank Act.

The Petitioners then listed several "factors" that have been mentioned in some of the cases dealing with the issue of whether an activity was within the "incidental powers" of national banks. These were only some of the considerations that the various cases discussed and were merely arguments offered by the parties in those cases in an attempt to establish that the activity at issue was closely related to an express power and was useful in carrying out the "business of banking". Let's take a brief look at the factors:

> (1) Whether the activity involves a traditional function of the banks versus a new and unfamiliar venture. See *M & M Leasing Corp. vs. Seattle First National Bank*, 563 F.2d 1377 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) (Certain leasing activities by national banks were considered "incidental" because leasing was incidental to the lending of money on personal security. The Court recognized that the powers of national banks must be construed to permit new ways

of conducting the business of banking.)

(2) Whether the new activity sought to be conducted is one which is already subject to regulation by non-banking agencies. This activity has always been regulated by the Comptroller. It is not an activity that has been conducted in another area, such as leasing. It is simply a new activity carried on by national banks as a part of their business of banking.

(3) Whether the new activity would expose national banks to risks of operation which Congress did not intend the banks to assume. See *American Society of Travel Agents, Inc. vs. Bank of America National Trust and Savings Association,* 385 F. Supp. 1084 (D. Cal. 1974). (The Court struck down a national bank being able to operate a full scale travel club that was offered to the public at large because Congress wanted to avoid the risk that the reputation of a bank would be tied to the successful operation of a business venture, subject to the vicissitudes of the marketplace, which is not incidental to the business of banking. The bank would have to put money into a failing business to protect the reputation of the bank and the public's confidence in the bank.)

(4) Whether the Comptroller has been consistent and logical in his positions with regard to the "incidental" nature of the proposed activity. See *Arnold Tours, Inc. vs. Camp,* 472 F.2d 427 (1st Cir. 1972). (The Court found that since the Comptroller had not been consistent in his interpretation of the statute, that his regulation finally authorizing national banks to engage in the travel agency business should not be given a dispositive deference.)

(5) Whether national banks have previously sought to avail themselves of an activity that is "convenient and useful" to the "business of banking". See *Arnold Tours, Inc. vs. Camp*, 472 F.2d 427 (1st Cir. 1972). (The bank tried to argue it was convenient and useful to operate a travel agency because many banks operated a travel agency business. The Court did not find this argument persuasive because not many banks did, in fact, operate a travel agency business.)

These cases were considered by the Eighth Circuit panel.

The Eighth Circuit did not err in its analysis of whether a debt cancellation agreement meets the test for "incidental powers" as defined by the National Bank Act.

Finally, the Court did note that this Court has made clear that the Comptroller's interpretation of the National Bank Act must be given great weight. *First National Bank vs. Missouri*, 263 U.S. 640 (1924). However, the panel did not "defer uncritically to the Comptroller's own self-serving pronouncements on the subject" in lieu of a detailed and careful analysis of the issue. After determining that debt cancellation agreements are directly connected to the Bank's lending activities, the panel deemed the Comptroller's authorization of this activity as reasonable and within the incidental powers granted by the National Bank Act. See Appendix, Page 6. No new standard was created whereby National Banks could conduct "virtually any insurance activity and, indeed, any business, so long as the Comptroller approves, and the activity has any remote connection to the extension of loans", as argued by the Petitioners. The Court applied the test set out in *Arnold Tours* in finding this activity to be incidental to the "business of banking".

Also, contrary to that stated in the Petitioners' Brief, the Comptroller has always approved of national banks issuing debt cancellation agreements since 1964. See 12 C.F.R. §7.7495; Public statement of May 18th, 1964, by Comptroller Saxton (all activities of a national bank, including its activities in executing debt cancellation contracts, are performed under its corporate powers and are governed by federal legislation and regulations pertaining to banking activities of national banks); Comptroller's Interpretive Letter No. 99, June 8th, 1979 (the Comptroller asked why national banks don't simply perform underwriting in-house through writing "debt cancellation contracts" as allowed by 12 C.F.R. §7.7495); Interpretive Letter No. 277, December 21st, 1983 (Comptroller determined that underwriting of credit life insurance was incidental to the business of banking); Letter of January 7th, 1988, from Senior Deputy Comptroller J. Michael Shepherd (Debt cancellation agreements are a form of self-protection and not the business of insurance). Clearly the Comptroller has always been consistent in his position that debt cancellation agreements are incidental to the business of banking.

The Eighth Circuit did not commit an error in its analysis of whether a debt cancellation agreement was an "incidental power" as defined by the National Bank Act by failing to analyze the legal issue. A careful and proper analysis was undertaken by the Eighth Circuit. Further, there was no improper deference to the Comptroller's opinion. It was only a consideration given by the Court and no error was committed in regard thereto.

## III.

## *NO NEW REVISION OF THE McCARREN-FERGUSON ACT AND NO NEW AUTHORITY FOR THE COMPTROLLER*

Nowhere in the pleadings, briefs or other matters before the District Court, the Eighth Circuit Court of Appeals, or this Honorable Court is it admitted, and the Respondents take a strong position against such a contention, that debt cancellation agreements are an insurance product. In fact, that is one of the issues in this case — that is, whether debt cancellation agreements constitute the "business of insurance". The panel made the determination that debt cancellation agreements were not the "business of insurance". The panel further found that the Comptroller's authorization of such agreements as an "incidental power" under the National Bank Act was reasonable. No applicable precedent was ignored and no new standard was created for marking the boundaries of state regulation of insurance matters under the McCarren-Ferguson Act. In reaching its decision, the panel simply applied the relevant decisions of this Court, as well as decisions of various United States courts of appeal.

The panel found that debt cancellation agreements do not constitute the "business of insurance". The panel cited the following two (2) reasons for its holding that the debt cancellation agreements offered by the Bank did not constitute the "business of insurance" under the McCarren-Ferguson Act:

(1) The McCarren-Ferguson Act was not directed at the activities of national banks;

(2) Debt cancellation contracts issued by banks in

connection with loans differ significantly from traditional insurance contracts.

See Appendix, Pages 7 and 9.

The Petitioners do not seem to understand the holding in this case. The Petitioners repeatedly argue that the Eighth Circuit panel applied a new standard — that First National Bank of Eastern Arkansas' "credit life insurance underwriting" is not the "business of insurance" because it is conducted by a national bank. This holding cannot be found anywhere in the Eighth Circuit's opinion in this case. The Petitioners completely ignore the fact that the Eighth Circuit panel was called upon to determine whether debt cancellation agreements constitute the "business of insurance" and that the Eighth Circuit found debt cancellation agreements do not constitute the "business of insurance". On the premises of this misinterpretation of the panel's decision, the Petitioners then allege that the Eighth Circuit committed two (2) errors:

> (1) The panel's approach to the issue concedes to the Comptroller of the Currency full power of interpretation over the McCarren-Ferguson Act because under the panel's decision, if the Comptroller first determines that an activity is within a national bank's "incidental powers" then there is no need, indeed, no possibility, of going on to consider whether this activity is within the "business of insurance" and, thus, subject to regulation by the states; and,
>
> (2) The panel's approach discards the 3-part test for the "business of insurance" under McCarren-Ferguson.

First of all, the panel did not concede to the Comptroller

of the Currency full power of interpretation over the McCarren-Ferguson Act. The Comptroller simply interpreted that "incidental powers" under 12 U.S.C. §24 (Seventh) of the National Bank Act included debt cancellation agreements. The Comptroller has no authority to determine and did not determine what is the "business of insurance" under the McCarren-Ferguson Act. This decision does not grant him any such power, either expressly or implicitly. This Honorable Court has already recognized that great weight should be given to the Comptroller's interpretations. *First National Bank vs. Missouri,* 263 U.S. 640 (1924). The Court did not simply accept his determination, but underwent its own analysis in making its decision. Nothing in the Court's decision indicates that the Comptroller has any authority to interpret the McCarren-Ferguson Act or that if an activity is found to be within an "incidental power" of the national bank, that there is no possibility that that activity could also constitute the "business of insurance".

Secondly, the first "error" is based upon a misinterpretation of the holding. The Eighth Circuit panel determined (1) debt cancellation agreements were not the "business of insurance" and (2) the Comptroller's authorization of the debt cancellation agreement was reasonable. These were two (2) different issues that needed to be resolved. The Court analyzed both issues separately and made independent findings as to each.

As to the second "error", the panel did analyze and follow *Union Labor Life Insurance Company vs. Pireno,* 458 U.S. 119 (1982), and *Group Life and Health Insurance Company vs. Royal Drug Company,* 440 U.S. 205 (1979), as well as other decisions of this Honorable Court. In *Pireno* and *Royal Drug,* the Court identified three (3) criteria relevant in determining

whether a particular practice is part of the "business of insurance":

> (1) Whether the practice has the effect of transferring or spreading a policyholder's risk;
>
> (2) Whether the practice is an integral part of the policy relationship between the insurer and the insured;
>
> (3) Whether the practice is limited to entities within the insurance industry.

The Court went on to find that none of these criteria is determinative in itself.

Turning to the first criterion, there is no spreading of risk among policyholders. The risk occurs when the bank loans the money to its customer. The debt cancellation agreement is offered by the bank as a means of handling the borrower's debt should he die before he can repay the loan. This enables the bank to avoid the time, expense, and risk associated with attempting to collect the balance of the loan from the borrower's estate.

In addition, there is no risk to the borrower because the debt will be extinguished, whether or not the bank is solvent. The Court found that debt cancellation agreements differ significantly from the traditional insurance contracts in that debt cancellation agreements do not require the bank to make a payment to the borrower's estate and, therefore, the prevention of insolvency is not of concern with the debt cancellation agreement. It is the primary concern with credit life insurance. The insurance company must be solvent to pay off the debt to the bank if its policyholder dies before the debt has been repaid. The bank does not have to make such a

payment, but simply extinguishes the debt. This is a very important difference between these two (2) products.

Looking at the second criterion, it is clear that debt cancellation agreements are not an integral part of a policy relationship between insurer and insured and, therefore, that criteria did not need to be discussed at all. The debt cancellation agreements were a separate contractual arrangement between the bank and its customers in regard to the distribution of services (i.e., lending of money) other than insurance which resulted in a cost savings to its customers. The debt cancellation agreements were a separate arrangement between the bank and its borrowers, neither of which are engaged in the business of insurance.

In looking at this case, the panel focused its attention mostly on the third criterion. It is obvious that the debt cancellation agreements are not limited to entities within the insurance industry. This case involves an activity carried on by a national bank and its customers. No entity within the insurance industry is involved at all. This Court has been reluctant to extend the definition of the "business of insurance" to include parties wholly outside the insurance industry. *Union Labor Life Insurance Company vs. Pireno,* 458 U.S. 119 (1982). The Court in *Pireno* further noted that the McCarren-Ferguson Act was intended primarily to protect "intra-industry cooperation" in the underwriting of risk.

The panel properly applied federal law in reaching its decision and no new test was established. The panel was not bound by the decisions of a few State Appellate Courts which found debt cancellation contracts to fall within their State's definitions of "insurance". See *Ware vs. Heth,* 237 S.W.2d 362

(Tex. Civ. App. 1951); *Attorney Gen. ex rel. Monk vs. C. E. Osgood Company*, 144 N.E. 371 (Mass. 1924); *State vs. Beardsley*, 88 Minn. 20, 92 N.W. 472 (1902); See also *United Sec. Life and Trust Company vs. Bond*, 16 App. D.C. 579 (1902). State law defining insurance is not controlling on the issue of whether an activity falls within the "business of insurance" as defined in the McCarren-Ferguson Act. *S.E.C. vs. Variable Annuity Life Insurance Company*, 359 U.S. 65 (1959). See Appendix, Page 10.

The Petitioners next allege an "error" in the Court's use of the language "investment risk" to the bank because "it does not focus upon how it effects the relationship between the insurer and the insured, but rather the investment risk to the bank". The Petitioners seem to have missed the point the Court was trying to make. The Court was not concerned with the effect these debt cancellation agreements might have on the solvency of the bank; that is for the Comptroller to regulate. The Court was focusing on the fact that there is no risk whatsoever to the customer with a debt cancellation agreement because the bank is simply extinguishing the debt as opposed to guaranteeing that the bank will pay a third party the balance of the debt. The borrower is not dependent upon the bank to remain solvent with a debt cancellation agreement; however, the borrower is at risk insofar as credit life insurance if the insurance company becomes insolvent. That is the primary and traditional concern behind the state insurance regulations and it is not a concern with a debt cancellation agreement.

Finally, one of a national bank's express powers is to loan money. Before loaning money to a borrower, the bank looks at the creditworthiness of the applicant and usually the value of the collateral offered to secure the loan. The Eighth Circuit

panel's decision does not offer any prospect for a wholesale usurpation of the state regulation of insurance by allowing banks to underwite automobile physical damage insurance through an agreement to cancel the debt if the automobile is destroyed in an accident, or fire insurance in the event of the burning of a mortgaged home, as stated by the Petitioners. The bank would still look to the borrower for the payment of his debt if one of these events happened and the destruction of the collateral is only secondary to the loan. Debt cancellation agreements are only being offered so as to enable the bank to lend money to certain borrowers and avoid the time, expense and risk associated with attempting to collect the balance of the loan from a borrower's estate.

In addition, *M & M Leasing Corp. vs. Seattle First National Bank*, 563 F.2d 1377 (9th Cir. 1977), *cert, denied*, 436 U.S. 956 (1978), recognized that a national bank cannot offer operational services such as repairs, maintenance, insurance coverage, license renewals, etc., because such services are not those of a national bank. In *M & M Leasing*, the Court found that the bank could engage in certain leasing activities.

None of the alleged errors cited by the Petitioners were committed by the Eighth Circuit Court of Appeals and, therefore, this Court should deny the Petitioners' request that a Writ of Certiorari be issued in this case.

## CONCLUSION

For all the foregoing reasons, the Petitioners' request for an issuance of a Writ of Certiorari to the Court of Appeals for the Eighth Circuit, so that this Honorable Court may review the Eighth Circuit panel's decision, should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Philip Hicky, II, hereby certify that I have served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari in accordance with Supreme Court Rules 29.3 and 29.5(b) by U.S. Mail, with sufficient pre-paid postage to Mr. Allan W. Horne, Mr. Chet Roberts and Mr. Lee Douglass, Davidson, Horne & Hollingsworth, 501 First Federal Savings Plaza, P. O. Box 3363, Little Rock, Arkansas 72203, attorneys for the Petitioners, this 19th day of October, 1990.

/s/ Philip Hicky, II
Butler, Hicky & Long

# APPENDIX

# UNITED STATES COURT OF APPEALS
## For the Eighth Circuit

No. 89-1260

| | | |
|---|---|---|
| First National Bank of Eastern Arkansas, A National Banking Association, | ★ | |
| Appellee, | ★ | |
| v. | ★ | |
| Ron Taylor,* Commissioner of the Insurance Department for the State of Arkansas | ★ | Appeal from the United States District Court for the Eastern District of Arkansas. |
| Appellant, | ★ | |
| Arkansas Credit Insurance Association (Intervenor Below), Appellant. | ★ | |

Submitted: January 18, 1990

Filed: June 25, 1990

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

LAY, Chief Judge.

In July, 1987, First National Bank of Eastern Arkansas

*Ron Taylor succeeded Robert M. Eubanks, III, as Commissioner of the Arkansas Insurance Department before the notice of appeal was filed. Thus, he is substituted as an appellant. *See* Fed. R. Civ. P. 25(d)(1).

(FNB) began offering debt cancellation contracts as additional-cost options to customers borrowing $10,000 or less. These contracts obligated FNB to cancel the unpaid loan balance remaining at the borrower's death, regardless of the cause of death. FNB offered the debt cancellation contracts at rates that did not vary with a borrower's age or medical condition. A regulation promulgated by the United States Comptroller of Currency (Comptroller) authorizes national banks to enter into debt cancellation contracts. *See* 12 C.F.R. § 7.7495 (1990).[1]

In September, 1987, the Arkansas Insurance Department notified FNB that debt cancellation contracts were the equivalent of credit life insurance policies, and thus subject to state insurance laws. The Department requested that FNB stop offering the contracts.[2] FNB complied, but then brought a suit in federal district court seeking a declaration that the Department's action was preempted by the National Bank Act, 12 U.S.C. §§ 21-216d (1988). Jurisdiction was invoked pursuant to 28

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[1]12 C.F.R. § 7.7495 provides.

> A national bank may provide for losses arising from cancellation of outstanding loans upon the death of borrowers. The imposition of an additional charge and the establishment of necessary reserves in order to enable the bank to enter into such debt cancellation contracts are a lawful exercise of the powers of a national bank and necessary to the business of banking.

[2]The Department indicated in its letter to FNB that the bank's failure to stop offering debt cancellation contracts would result in enforcement action by the Commissioner. Under Ark. Code of 1987 Ann. § 23-65-105 (Supp. 1989), the Commissioner has authority to issue a cease and desist order against any person who engages in the business of insurance without a license.

U.S.C. §§ 1331 and 2201.[3] The district court[4] held that the National Bank Act protected FNB's power to enter into debt cancellation contracts, and that the contracts did not constitute the "business of insurance" under section 2 of the McCarran-Ferguson Act, 15 U.S.C. § 1012 (1988). The Commissioner of the Arkansas Insurance Department (Commissioner) appeals.[5] We affirm the district court.

I.

Our inquiry in this case is limited to the question whether the Arkansas Insurance Commissioner may prohibit FNB from

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[3]We raised a question about jurisdiction on our own motion after argument. In *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 248 (1952), the Court suggested that federal-question jurisdiction may be lacking when a declaratory complaint sets forth a claim of federal right that is in the nature of a defense to a threatened state court action. Based on that dicta, and the "well-pleaded complaint" rule, this court in *Home Federal Savs. & Loan Ass'n v. Insurance Dep't of Iowa*, 571 F.2d 423 (8th Cir. 1978) and in *Lawrence County v. South Dakota*, 668 F.2d 27 (8th Cir. 1982), rejected federal jurisdiction because the preemption claim was in the nature of a defense to a state action. However, the Supreme Court has since made clear that a party may apply directly to federal court for relief based on an affirmative claim of preemption. *See Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 259 n.6 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). Jurisdiction is not defeated simply because a plaintiff requests declaratory relief rather than an injunction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); 13B C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3566, at 99 (1984). Thus, we have jurisdiction to review the merits of this case.

[4]The Honorable George Howard Jr., United States District Judge for the Eastern District of Arkansas.

[5]The Arkansas Credit Insurance Association intervened below, and joins the Commissioner in this appeal.

entering into debt cancellation contracts.[6] The Commissioner initially urges that such a prohibition does not conflict with federal law because the National Bank Act does not grant national banks the power to offer debt cancellation contracts. The Commissioner argues that in authorizing the contracts, the Comptroller has exceeded his authority. We disagree.

In addition to enumerating specific powers, including the lending of money, the National Bank Act grants national banks the power to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). The Comptroller, through 12 C.F.R. § 7.7495, has interpreted "incidental powers" to include the offering of debt cancellation contracts, and the Supreme Court has made clear that the Comptroller's interpretation of the National Bank Act must be given "great weight":

> "It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by

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[6]Because the Commissioner's request that FNB stop offering debt cancellation contracts was grounded on FNB's failure to obtain a state license, the parties dispute whether this case should be regarded as one of prohibition or regulation. However, Arkansas law requires licensees to submit to extensive state regulation, including maintenance of specific capital and surplus levels, payment of licensing fees, financial information disclosure, and inspection by the Commissioner. Compliance with these requirements would pervert FNB's status as a federal instrumentality. Moreover, 12 U.S.C. § 484 (1988) prohibits states from exercising "visitorial powers" over national banks. For these reasons, we regard the Commissioner's request as a prohibition on FNB's issuance of debt cancellation contracts.

The Comptroller, in an amicus curiae brief, concedes that there may be particular state insurance regulations (e.g., those limiting premium rates) which apply to debt cancellation contracts and which do not conflict with national banking powers. We agree with the Comptroller's argument that these issues are more properly addressed on a case-by-case basis.

> the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws. See *First National Bank v. Missouri*, 263 U.S. 640, 658 [1924]."

*Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987) [quoting *Investment Co. Institute v. Camp*, 401 U.S. 617, 626-27 (1971)]. The Comptroller's determination as to what activities are authorized under the National Bank Act should be sustained if reasonable. *See Clarke*, 479 U.S. at 406, 409.

The "incidental powers" of national banks are not limited to activities that are deemed essential to the exercise of express powers. Rather, courts have analyzed the issue by asking whether the activity is closely related to an express power and is useful in carrying out the business of banking. For example, the Supreme Court, in *Colorado Nat'l Bank v. Bedford*, 310 U.S. 41 (1939), held that a national bank was authorized to operate a safe-deposit business, reasoning that this activity was incidental to the bank's express power to accept special deposits. *Id.* at 49-50. *See also Securities Indus. Ass'n v. Clarke*, 885 F.2d 1034, 1049 (2d Cir. 1989) (sale of mortgage "pass-through" certificates authorized by National Bank Act because "convenient and useful" in connection with bank's sale of mortgage loans), *cert. denied*, 110 S. Ct. 1113 (1990); *American Ins. Ass'n v. Clarke*, 865 F.2d 278, 281-82 (D.C. Cir. 1988) (sale of municipal bond insurance by national bank subsidiary falls within incidental powers because it is essentially a credit product); *M & M Leasing v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977) (National Bank Act authorizes personal property leasing that is incidental to national bank's express power to "loan money on personal property"), *cert. denied*, 436 U.S. 956 (1978); *cf. Arnold*

*Tours, Inc. v. Camp*, 472 F.2d 427, 433-34 (1st Cir. 1972) (operation of full-scale travel agency not within incidental powers because not convenient or useful in connection with any express power).

As the district court found, the debt cancellation contracts at issue in this case are directly related to FNB's expressly-authorized lending power. The contracts are sold only in connection with loans made by FNB, and involve only FNB and its borrowing customers. The contracts provide borrowers with a convenient method of extinguishing debt in case of death, and enable FNB to avoid the time, expense, and risk associated with attempting to collect the balance of the loan from a borrower's estate. Because we agree with the district court that the debt cancellation contracts are directly connected to FNB's lending activities, we deem the Comptroller's authorization of this activity as reasonable and within the incidental powers granted by the National Bank Act.

II.

Having found that the National Bank Act authorizes national banks to offer debt cancellation contracts as "incidental" to the business of banking, we find in favor of FNB under the principle of federal preemption. Because national banks are considered federal instrumentalities, *e.g.*, *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 375 (1954), states may neither prohibit nor unduly restrict their activities. *See id.* at 378-79; *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944). Thus, the National Bank Act preempts the Commissioner's authority to prohibit FNB from offering debt cancellation contracts.

The Commissioner argues, however, that section 2 of the McCarran-Ferguson Act limits the preemptive power of the

National Bank Act in this case because it forbids courts to construe the National Bank Act in a manner that impairs a state's authority to regulate the "business of insurance." 15 U.S.C. § 1012(b).[7] The Commissioner urges that because debt cancellation contracts have the same effect as credit life insurance contracts, they are subject to the exclusive regulatory authority of the state under the McCarran-Ferguson Act. We reject this argument. We hold that because the debt cancellation contracts offered by FNB fall within the incidental powers granted by the National Bank Act, they do not constitute the "business of insurance" under the McCarran-Ferguson Act.

We reach this holding for two reasons. The primary reason is that the McCarran-Ferguson Act was not directed at the activities of national banks. The McCarran-Ferguson Act was passed by Congress in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which held that the insurance industry was subject to regulation by Congress under the Commerce Clause, and that insurance company activities were subject to federal antitrust laws. *Id.* at 553. The McCarran-Ferguson Act was designed to preserve traditional state regulation and taxation of insurance companies, and to provide insurance companies with a partial exemption from federal antitrust laws. *Group Life & Health Ins.*

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[7]The relevant portion of section 2 of the McCarran-Ferguson Act reads as follows:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
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> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance • • • .

15 U.S.C. § 1012.

*Co. v. Royal Drug Co.*, 440 U.S. 205, 217-18 (1979); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982). In holding that certain pharmacy contracts involving health-care organizations were not the "business of insurance," the Court in *Group Life* expressed doubt as to whether the McCarran-Ferguson Act applied to entities commonly thought to be outside the insurance industry:

> There is not the slightest suggestion in the legislative history that Congress in any way contemplated that arrangements such as the Pharmacy Agreements in this case, which involve the mass purchase of goods and services from entities outside the insurance industry, are the "business of insurance."
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> • • •
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> At the time of the enactment of the McCarran-Ferguson Act, corporations organized for the purpose of providing their members with medical services and hospitalization were not considered to be engaged in the insurance business at all, and thus were not subject to state insurance laws. • • • Since the legislative history makes clear that Congress certainly did not intend the definition of the "business of insurance" to be *broader* than its commonly understood meaning, the contemporary perception that health-care organizations were not engaged in providing insurance is highly significant in ascertaining congressional intent.

440 U.S. at 224-27 (emphasis in original). *See also Union Labor Life*, 458 U.S. at 133 ("§ 2(b) [of the McCarran-Ferguson Act] was intended primarily to protect '*intra*-industry cooperation' in the underwriting of risks") (quoting *Group Life*, 440 U.S. at 221) (emphasis in original); *United Servs. Auto. Ass'n v. Muir*, 792

F.2d 356, 364 (3d Cir. 1986) (Pennsylvania statute prohibiting mergers between banks and insurance companies not protected by McCarran-Ferguson Act because, among other reasons, banks are not entities within the insurance industry), *cert. denied*, 479 U.S. 1031 (1987).

The McCarran-Ferguson Act was not intended to give states power to regulate beyond that which they had been thought to possess prior to the *South-Eastern Underwriters* decision. As the Court in *SEC v. National Sec., Inc.*, 393 U.S. 453 (1969) said,

> The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation. As the House Report makes clear, "[i]t [was] not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case." H.R. Rep. No. 143, 79th Cong., 1st Sess., 3 (1945).

*Id.* at 459. *See also Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 n.8 (1985). Yet, well before the *South-Eastern Underwriters* decision, regulation of national banks was within the exclusive domain of the federal government. *E.g., First Nat'l Bank v. California*, 262 U.S. 366, 369 (1923). This strongly indicates that Congress did not intend the "business of insurance" to encompass lawful activities of national banks.

Our second reason for holding that the debt cancellation contracts offered by FNB are not the "business of insurance" is

that debt cancellation contracts issued by banks in connection with loans differ significantly from traditional insurance contracts. Although debt cancellation contracts may, as the Commissioner argues, transfer some risk from the borrower to the bank,[8] the contracts do not require the bank to take an investment risk or to make payment to the borrower's estate. The debt is simply extinguished when the borrower dies. Thus, the primary and traditional concern behind state insurance regulation — the prevention of insolvency — is not of concern to a borrower who opts for a debt cancellation contract. As Justice Brennan said in his concurring opinion in *Variable Annuity Life*, 359 U.S. at 90-91, "The prevention of insolvency and the maintenance of 'sound' financial condition in terms of fixed-dollar obligations is precisely what traditional state regulation [of insurance] is aimed at." The fact that debt cancellation contracts issued by national banks in connection with loans do not implicate this central concern of insurance regulation, at least as it relates to the ability of the banks to fulfill their obligations under the contracts, adds further support to our

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[8]We acknowledge that in addition to the Commissioner a few state appellate courts have found debt cancellation contracts to fall within their states' definitions of "insurance." *See Ware v. Heath*, 237 S.W.2d 362 (Tex. Civ. App. 1951); *Attorney Gen. ex rel. Monk v. C. E. Osgood Co.*, 144 N.E. 371 (Mass. 1924); *State v. Beardsley*, 88 Minn. 20, 92 N.W. 472 (1902); *see also United Sec. Life & Trust Co. v. Bond*, 16 App. D.C. 579 (1902). However, state law defining insurance is not controlling on the issue of whether an activity falls within the "business of insurance" as that term is used in the McCarran-Ferguson Act. *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 (1959).

holding that debt cancellation contracts should not be considered the "business of insurance."[9]

III.

In conclusion, we hold that the National Bank Act precludes the Arkansas Commissioner of Insurance from prohibiting FNB, either by direct coercion or through a license requirement, from entering into debt cancellation contracts with its borrowers. The Comptroller has reasonably determined that these contracts are authorized by the National Bank Act, and we think that this determination must control. Therefore, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[9]The responsibility of ensuring the financial condition of the national banking system has long been committed to the Comptroller. In the case of debt cancellation contracts, the Comptroller has indicated that banks must use prudent banking judgment, which may include the establishment of reserves to cover losses resulting from early debt cancellation. *See* 12 C.F.R. § 7.7495; Letter from J. Michael Shepherd, Senior Deputy Comptroller for Corporate and Economic Programs, to W. D. Glover, FNB Chairman and President, (Jan. 7, 1988) (Trial Ex. 8). If a national bank is engaging in "unsafe or unsound" banking practices, the Comptroller, under 12 U.S.C. § 1818(b), may issue a cease and desist order.